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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

AARON GREENSPAN,
Plaintiff,
v.
OMAR QAZI, SMICK ENTERPRISES, INC.,
ELON MUSK, and TESLA, INC.,
Defendants.

Case No. 3:20-cv-03426-JD

**PLAINTIFF'S NOTICE OF
MOTION AND MOTION FOR
LEAVE TO FILE COMBINED
SUR-REPLY TO DEFENDANTS'
MOTIONS TO DISMISS
PLAINTIFF'S THIRD
SUPPLEMENTAL AND
AMENDED COMPLAINT**

Date: TBD
Time: TBD
Courtroom: 11, 19th Floor

Judge: Hon. James Donato
Complaint Filed: May 20, 2020
TAC Filed: February 12, 2021

NOTICE OF MOTION AND MOTION**TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD: PLEASE TAKE**

NOTICE THAT Plaintiff Aaron Greenspan hereby moves this Court, pursuant to Civil Local Rule 7-3(d), for an order granting leave to file a two-page sur-reply (attached hereto as Exhibit A) primarily in response to a new argument introduced in the reply brief of Defendants Omar Qazi and Smick Enterprises, Inc. (ECF No. 117), and in response to clear errors in the reply brief of Defendants Tesla, Inc. and Elon Musk that counsel has refused to correct. A sur-reply is especially appropriate in these circumstances to refute baseless new argument, which amounts to nothing more than a mix of rampant speculation and falsehood. This Motion is based upon this Notice of Motion and Motion and the accompanying Memorandum of Points and Authorities, the papers on file in this action, and such other and further evidence or argument that the Court may consider.

STATEMENT OF RELIEF SOUGHT

Plaintiff seeks an order permitting the filing of a two-page sur-reply.

STATEMENT OF ISSUE TO BE DECIDED

The issue to be decided is whether manifest error and/or new argument in a reply brief merits the filing of a sur-reply.

MEMORANDUM OF POINTS AND AUTHORITIES

In their motion to dismiss (ECF No. 107), Defendants Omar Qazi and Smick Enterprises, Inc. (“Qazi Defendants”) took the position that although their “Statements may not be tasteful to some,” they did not amount to libel or form the basis for harassment. In Plaintiff’s opposition brief (ECF No. 109), Plaintiff argued that the Statements went far beyond poor taste, well into the realm of libel, and also formed part (but not all) of the basis for a civil harassment claim. Qazi Defendants then took a new and self-contradictory position for the first time in their reply (ECF No. 117): that actually, the Statements disparaging Plaintiff *are* “tasteful” to *everyone*, and in fact, that is why *everyone* who follows Qazi Defendants’ @WholeMarsBlog Twitter account has done so. In their words, “by Plaintiff’s own admission, tens of thousands of people

1 voluntarily followed the Smick Defendants' Twitter feed based on their interest in seeing
 2 Plaintiff mocked." *Id.* at 2:15-17.

3 Whether or not this argument is true or false—and it is false in several respects—this
 4 argument is certainly new. Without the opportunity to file a sur-reply, the argument will stand
 5 uncontested, in a prime example of a "classic form of sandbagging that is barred under Paragraph
 6 15 of the Court's Standing Order for Civil Cases." *In Re Capacitors Antitrust Litigation*, Case
 7 No. 3:14-cv-03264-JD (N.D. Cal. March 7, 2017).

8 In addition, Defendants Tesla, Inc. and Elon Musk ("Tesla Defendants") include two
 9 black-and-white errors in their reply brief that require correction under Paragraph 23 of the
 10 aforementioned Standing Order for Civil Cases. Counsel thus far appears to be unwilling to
 11 admit to these errors, let alone correct them. Plaintiff should therefore have the opportunity to
 12 correct them instead.

13 In light of these circumstances, Plaintiff respectfully submits that his motion to file a sur-
 14 reply should be granted, or in lieu of a sur-reply, that the respective portions of each brief at issue
 15 should be stricken from the record.

16
 17 Dated: April 28, 2021

Respectfully submitted,



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EXHIBIT A
Plaintiff's Proposed Sur-Reply

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Case No. 3:20-cv-03426-JD

**[PROPOSED] PLAINTIFF'S
COMBINED SUR-REPLY TO
DEFENDANTS' MOTIONS TO
DISMISS PLAINTIFF'S THIRD
SUPPLEMENTAL AND
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1 Between the time they filed their motion to dismiss (ECF No. 107) and their reply brief
 2 (ECF No. 117), Defendants Omar Qazi and Smick Enterprises, Inc. (“Qazi Defendants”)
 3 reversed their position with respect to Plaintiff’s libel claim and found themselves making an
 4 entirely new argument. To justify this shift, they falsely attributed their change to Plaintiff by
 5 conjuring up an “admission” that Plaintiff never made and which Plaintiff refutes completely.

6 At first, Qazi Defendants took the erroneous position that although their “Statements may
 7 not be tasteful to some,” they did not amount to libel or form the basis for harassment. In
 8 Plaintiff’s opposition brief (ECF No. 109), Plaintiff argued that the Statements went far beyond
 9 poor taste, well into the realm of libel, and also formed part (but not all) of the basis for a civil
 10 harassment claim. Qazi Defendants then took a new position in their reply (ECF No. 117): that
 11 the Statements disparaging Plaintiff *are* “tasteful” to *everyone*, and in fact, that is why *everyone*
 12 who follows Qazi Defendants’ @WholeMarsBlog Twitter account has done so. In their words,
 13 “by Plaintiff’s own admission, tens of thousands of people voluntarily followed the Smick
 14 Defendants’ Twitter feed based on their interest in seeing Plaintiff mocked.” *Id.* at 2:15-17.

15 Plaintiff never made any such “admission,” nor could he, because the supposedly
 16 admitted allegation is not true. Plaintiff never even suggested that there was a causal link
 17 between the fact that Defendant Qazi has spewed libel about him for years and Qazi’s follower
 18 count—there is not. Qazi Defendants’ enormous logical leap, that “Plaintiff necessarily alleges
 19 that 20,000 people followed the Smick Defendants’ Twitter feed to view Qazi’s posts about
 20 Plaintiff” is itself provably false, falsely attributes a position to Plaintiff, and ultimately fails to
 21 bolster their view that there is no difference between “widespread interest” and “public interest.”
 22 *Id.* at 3:2-3. Their own vague citation to “*FilmOn.com Inc.*, 7 Cal. 5th at 150-51” involves no
 23 quotation because there is no part of that case supporting the proposition for which they cite it.
 24 Their citation to *Nygard* leads to two other cases cited therein to decipher the meaning of “public
 25 significance,” both of which are totally distinguishable from this one. In *Seelig v. Infinity*
 26 *Broadcasting Corp.* (2002) 97 Cal. App.4th 798, 119 Cal.Rptr.2d 108, the plaintiff “chose[] to
 27 participate as a contestant in the Show.” *Id.* at 221. Plaintiff did not *choose* to be discussed on
 28

1 Qazi Defendants' social media accounts. Rather, Qazi Defendants targeted Plaintiff for
 2 harassment, using *ad hominem* attacks to sidestep any true debate. Third Supplemental and
 3 Amended Complaint ("TAC") ¶ 28. In *Sipple v. Foundation for Nat. Progress* (1999) 71
 4 Cal.App.4th 226, 83 Cal.Rptr.2d 677, there was some debate over allegations of physical abuse
 5 involving a prominent political figure. Here, Qazi Defendants *manufactured false allegations*
 6 *out of whole cloth*, and do not deny that they further fabricated supposed victims.

7 As for Plaintiff's DMCA claim under 17 U.S.C. § 512(f), Plaintiff has overwhelmingly
 8 demonstrated that Qazi Defendants have made false statements, statements encouraging
 9 harassment, statements encouraging violence, and statements in bad faith. These allegations are
 10 incorporated by reference into the claim and provide crucial context supporting Plaintiff's
 11 assertion that Defendant Qazi's DMCA requests were part of the same bad-faith campaign.

12 For their part, Defendants Tesla, Inc. and Elon Musk ("Tesla Defendants") include two
 13 black-and-white errors in their reply brief (ECF No. 116) that require correction. First, in
 14 footnote 2, Tesla Defendants cite *Willett v. Procopio*, 2018 WL 9539242, at *1 (S.D. Cal. July
 15 25, 2018) and summarize it as, "applying PSLRA and granting motion to dismiss pro se
 16 securities complaint." In fact, *Willett* did not dispose of a "motion to dismiss" at all, but rather a
 17 motion for default judgment that never raised the argument of whether or not the PSLRA applies
 18 to *pro se* litigants. Second, Tesla Defendants argue on page 6 that, "Plaintiff has evidently
 19 abandoned his attempt to hold the Tesla Defendants vicariously liable for Mr. Qazi's alleged
 20 conduct." This is false. Section IV(A)(1) of Plaintiff's opposition brief is explicitly entitled,
 21 "Vicarious Liability For Libel **and Civil Stalking** by Omar Qazi" (emphasis added). The
 22 arguments in that section pertain both to libel and to civil stalking.

23 Lastly, Tesla Defendants argue that the TAC is a "puzzle pleading" in violation of Rule
 24 8. This very Court guided its format. It is direct and comprehensible. Tesla Defendants have
 25 had no problem responding to its allegations, and securities complaints *much* longer than
 26 Plaintiff's have been found to comport with Rule 8. *In re Parmalat Securities Litigation*, 375 F.
 27 Supp. 2d 278, 311 (S.D.N.Y. 2005) (368-page complaint with 1,249 paragraphs permitted).

1 Dated: April 28, 2021

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